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EXAMINER

BUI, LUAN KIM

ART UNIT	PAPER NUMBER
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3728

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Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/085,637
Filing Date: February 28, 2002
Appellant(s): MCMICHAEL ET AL.

Neal P. Pierotti
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 9/16/2004.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

Art Unit: 3728

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 1-14 do rise or fall together and claims 15-23, 25 and 26 rise or fall together.

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

5,318,543	ROSS et al.	6/1994
5,392,918	HARRISON	2/1995
6,039,183	RUDNICK et al.	3/2000

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

1. It is noted that a terminal disclaimer refers to this application filed on 3/15/2004 in the patent application s/n 10/085,417 has been reviewed and is accept. Therefore, all obviousness-type double patenting rejections have been obviated.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 3728

3. Claims 1-23 and 25-26 are finally rejected under 35 U.S.C. 103(a) as being unpatentable over Ross et al. (5,318,543; hereinafter Ross'543) in view of Harrison (5,392,918) and Rudnick et al. (6,039,183; hereinafter Rudnick'183). Ross'543 discloses a kit (10) for holding surgical articles comprising a tray (13) having a plurality of planar surfaces with a plurality of recesses for holding surgical articles, a removable container (20) containing surgical articles (18, 19) disposed within at least one of the planar surfaces/container recess and a cover (12). Ross'543 discloses the container (20) must be removed from the tray prior to access to the articles (17, 27). Ross'543 also discloses the other claimed limitations except for the container being a substantially rigid container having a base member and a lid. Harrison teaches a package assembly/kit (20) comprising a cover (28) for a tray (24) having recess and a container (26) disposed within the tray including a base member (72) and a lid (70) that define an interior space for holding an article. Rudnick'183 shows a package assembly/kit (20) comprising a cover (26) for a tray (22) having a plurality of recesses disposed therein and a container (24) adapted to fit at least partially within the tray including a base member (44) and a lid (46). Rudnick'183 further teaches the container comprising a securing device includes a male boss member (49) and a female recess (49). It would have been obvious to one having ordinary skill in the art in view of Harrison and Rudnick'183 to modify the container of Ross'543 so the container comprises a substantially rigid container having a base and a lid that define an interior space for holding the articles for better protecting the articles and to facilitate opening and/or closing the container. As to claim 15, it would have been obvious to one having ordinary skill in the art in view of Ross'543 as modified to modify the container so the container is used to hold accessory articles such as the articles in column 2, lines 40-43 of Ross'543 because the selection of the specific

Art Unit: 3728

articles for the container would have been an obvious matter of design choice inasmuch as the resultant structures will work equally well.

Allowable Subject Matter

4. Claim 24 is allowed.

(11) Response to Argument

CLAIMS 1-14

A1. THE FINAL REJECTION FAILS ...

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Rudnick'183 teaches a container (24) comprises a base member (44) and a lid (46) to define an interior space. Rudnick'183 further shows a securing device (49) (Figures 5 and 6). The interior space of the container of Rudnick'183 is capable of receiving at least one article. Harrison also shows a container (26) comprises a base member (72) and a lid (70) for holding an article. However, Ross'543 discloses a container (20) in the formed of a bag for holding at least one article (18, 19) within the bag and the article must be removed for usage. There does not appear to be anything unobvious about using the teaching of Harrison and

Art Unit: 3728

Rudnick'183 to modify the container of Ross'543 so the container comprises a base member and a lid for holding the at least one article within the container for better protecting the at least one article and because the primary reference i.e. Ross'543 discloses the article disposed within the container (20).

A2. THE COMBINATION OF ...

Appellant argues that the application calls for “a substantially rigid container ...” is noted. Rudnick'183 teaches the container (24) formed from plastic material such as polyethylene, PET, including PETE and PETG (column 3, lines 1-5) which is considered equivalent to a substantially rigid container. Harrison shows the container (26) formed from the same material as that of the tray and the tray formed of a self-supporting material so it can retain its shape (column 6, lines 30-32 and 56-58) which is considered equivalent to a substantially rigid container. Ross'543 discloses the container (20) is configured for holding the at least one article inside the container. Therefore, the container of Ross'543 as modified comprises the base member and the lid as taught by Harrison and Rudnick'183 is also configured for holding the at least one article inside the container.

CLAIMS 15-23, 25 and 26

B1. THE FINAL REJECTION FAILS ...

Appellant's argument with respect to Ross'543 is noted. This is not persuasive because Ross'543 does not disclose a drape that is placed loosely in a first recess of the tray 13 as argued by the Appellant, but Ross'543 discloses components such as a sterile drape, swabs, a packet of

Art Unit: 3728

cotton (column 2, lines 40-43) could be placed in the recess of the tray. Ross'543 further discloses the container (20) contains the at least one article is also placed in the recess of the tray and in this case the at least one article is not placed loosely in the recess of the tray. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the container of Ross'543 as modified so the container includes the base member and the lid is configured to hold at least one accessory articles such as the sterile drape for better protecting the sterile drape.

B2. THE CITED REFERENCES DO NOT ...

Appellant argues that “Nowhere in the Final Rejection ... at least a drape.” is noted. This is not understood because on page 3, lines 7-11 of the final rejection, the Examiner stated that “it would have been obvious to one having ordinary skill in the art in view of Ross'543 as modified to modify the container so the container is used to hold accessory articles such as the articles in column 2, lines 40-43 of Ross'543 because the selection of the specific articles for the container would have been an obvious matter of design choice inasmuch as the resultant structures will work equally well.” Since the articles in column 2, lines 40-43 of Ross'543 include a sterile drape, the container of Ross'543 as modified is configured to contain the sterile drape.

Appellant's arguments with respect to Ross'543, Harrison and Rudnick'183 in the brief are noted. They are not persuasive because it does not appear to be anything unobvious to one having ordinary skill in the art in view of Harrison and Rudnick'183 to modify the container in the form of the bag and the bag is configured to hold the at least one article inside the bag as

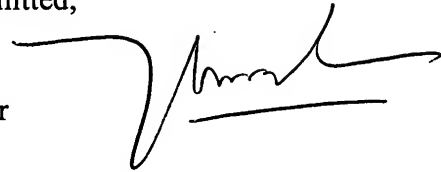
Art Unit: 3728

shown by Ross'543 to the container in the form of the base member and the lid for holding the at least one article inside the container for further protecting the article.

For the above reasons, it is believed that the rejections should be sustained.


Respectfully submitted,

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Primary Examiner
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lkb
October 25, 2004

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